

Cancellation of Removal

2018 Executive Office for Immigration Review
JLC Training Program



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Non-LPR Cancellation of Removal

- INA § 240A(b)(1) -



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- **10 years of continuous physical presence**
 - Military service exception (INA § 240A(d)(3))
- **Good moral character during 10-year period**
 - Continuing application; no stop-time. *Matter of Ortega-Cabrera*, 23 I&N Dec. 793 (BIA 2005)



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- **Not convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3) of the Act.**
 - Bar applies even if conviction is not basis for removal charge. *Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009)
 - Inconclusive record does not meet applicant's burden of proof
 - Offense is “described under” regardless of immigration-related aspects of those sections. *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010); *but see Lozano-Arredondo v. Sessions*, 866 F.3d 1082 (9th Cir. 2017) (holding statutory language “offense under” is ambiguous)
 - CIMT that qualifies for the petty offense exception is not “an offense under” section 212(a)(2)(A)(i)(I) but may be described under section 237(a)(2)(A)(i). *Matter of Almanza, supra*; *Matter of Garcia-Hernandez*, 23 I&N Dec. 590 (BIA 2003)



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- **Exceptional and extremely unusual hardship to a qualifying relative**
 - USC or LPR spouse, parent, or child
 - INA defines “child” as under 21. See *Matter of Isidro*, 25 I&N Dec. 829 (BIA 2012) (aging out)
 - includes stepparent and stepchild
 - “substantially beyond” (*Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001))
 - *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002)
 - *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002)
 - *Matter of Calderon-Hernandez*, 25 I&N Dec. 885 (BIA 2012) (no affidavit required to show child will remain in US with other parent)
 - Aggregate analysis, but EEUH to “a” qualifying relative



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- **Not ineligible under section 240A(c) of the Act**
 - Crewmen
 - Certain 101(a)(15)(J) educational exchange nonimmigrants
 - Inadmissible under 212(a)(3) or 237(a)(4)
 - Persecutors
 - Previous grant of similar relief
- **Warrants favorable exercise of discretion**

LPR Cancellation of Removal

- INA § 240A(a) -



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- **5 years of lawful permanent residence**
 - LPR status must be lawfully obtained; one who acquired status by fraud or misrepresentation is not “lawfully admitted for permanent residence.” *Matter of Koloamatangi*, 23 I&N Dec. 548 (BIA 2003)
- **7 years of continuous residence after admission**
 - Admission in any status sufficient. *Matter of Castillo Angulo*, 27 I&N Dec. 194 (BIA 2018)
 - Adjustment of status counts as an admission
 - Military service exception (INA § 240A(d)(3))



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- **No aggravated felony conviction**
 - Bar applies even if not charged as ground of removal
- **Not barred under § 240A(c) of the Act**
- **Warrants favorable exercise of discretion**

Suspension of Deportation

- Former INA § 244 -



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- **Currently available in limited circumstances**
- **Seven-Year Suspension**
- **Ten-Year Suspension**
 - Relief for those convicted of more serious crimes (ex: CIMTs and narcotics)
 - When charged with those grounds of deportability. See *Matter of Ching*, 12 I&N Dec. 710 (BIA 1968)



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Requirements

- Seven years of continuous physical presence (ten years if deportable under criminal, document fraud, or security related grounds)
- Good moral character during entire period (date of conviction)
- Extreme hardship to alien or USC/LPR spouse, child, or parent (exceptional and extremely unusual hardship if deportable under criminal, document fraud, or security related grounds)
- Not inadmissible under Nazi or genocide grounds
- Warrants favorable exercise of discretion

NACARA Special Rule Cancellation of Removal

- 8 C.F.R. §§ 1240.60-1240.70 -



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- **Is an individual described in 8 C.F.R. § 1240.61**
- ***If not removable under § 212(a)(2) or (3), or § 237(a)(2), (3), or (4):***
 - 7 years of continuous physical presence
 - Good moral character during 7-year period
 - Extreme hardship to alien or a qualifying relative
 - Rebuttable presumption of extreme hardship. 8 C.F.R. § 1240.64(d))

Note: Board has held application is continuing for cpp and gmc, but 8th and 9th Circuits have disagreed. *Compare Matter of Garcia*, 24 I&N Dec. 179 (BIA 2007), with *Aragon-Salazar v. Holder*, 769 F.3d 699 (9th Cir. 2014), and *Cuadra v. Gonzales*, 417 F.3d 947 (8th Cir. 2005).



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- ***If removable under those sections, heightened burden:***
 - Not convicted of an aggravated felony
 - 10 years of continuous physical presence following commission of most recent act
 - Good moral character during 10-year period
 - Exceptional and extremely unusual hardship to alien or qualifying relative
- **Warrants favorable exercise of discretion**

VAWA Cancellation and Suspension

- INA § 240A(b)(2) -**
- Former INA § 244(a)(3) -**



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- **Any alien**
 - Includes LPRs, see *Matter of A-M-*, 25 I&N Dec. 66 (BIA 2009)
- **Who has been battered or subjected to extreme cruelty, or whose child has been battered or subjected to extreme cruelty**
 - See 8 C.F.R. § 204.2(c)(1)(vi)
- **By spouse, putative spouse, or parent**
- **Abuser is or was USC or LPR**



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Requirements

- **3 years of continuous physical presence**
 - Exceptions:
 - Stop-time exception
 - Exception for absence connected to battery or extreme cruelty
- **Good moral character during 3-year period**
 - Exception to 101(f)
 - conviction connected to abuse will not bar good moral character
- **Not removable under § 212(a)(2) or (3), or § 237(a)(1)(G), (2), (3), or (4)**



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- **No aggravated felony conviction**
- **Extreme hardship to self, child, or parent**
 - 8 C.F.R. § 1240.58
 - No lawful status requirement
- **Merits Favorable Exercise of Discretion**
 - *Matter of M-L-M-A-*, 26 I&N Dec. 360 (BIA 2014)
 - *Matter of A-M-*, *supra*



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Special Considerations

- Adjudicator must consider “any credible evidence” relevant
- INA § 240A(c) bars do not apply



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VAWA Suspension of Deportation

- *is deportable under any law of the United States except section 241(a)(1)(G) and paragraph (2), (3), or (4) of section 241(a); has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application; has been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a United States citizen or lawful permanent resident (or is the parent of a child of a United States citizen or lawful permanent resident and the child has been battered or subjected to extreme cruelty in the United States by such citizen or permanent resident parent); and proves that during all of such time in the United States the alien was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or the alien's parent or child.*



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Applicable Regulations

- 8 C.F.R. § 1240.65(d) – eligibility provisions for VAWA suspension
- 8 C.F.R. § 1240.58 – defines extreme hardship, including special definition for VAWA claims
- 8 C.F.R. § 1240.20(c) – explicitly applies extreme hardship factors to VAWA cancellation claims
- 8 C.F.R. § 204.2(c)(1)(vi) – defines battery or extreme cruelty

Breaks in
continuous physical presence



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What is a “Break?”

- **Statutory breaks**
 - INA § 240A(d)(2): 90-day bar and aggregate 180-day bar
- **Departure compelled by threat of proceedings**
 - *Matter of Romalez*, 23 I&N Dec. 423 (BIA 2002)
- **Departure after conviction for illegal entry**
 - *Matter of Velasquez-Cruz*, 26 I&N Dec. 458 (BIA 2014)
(departure after functional equivalent to finding of inadmissibility)



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- ***Matter of Avilez*, 23 I&N Dec. 799 (BIA 2005):**
 - exclusion at POE
 - expedited removal order
 - permitted to withdraw application for admission
 - any other **formal, documented process** pursuant to which the alien is determined to be inadmissible



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What is a “formal, documented process?”

- **Voluntary return constitutes break if alien was advised of right to hearing before IJ and affirmatively agreed to depart in lieu of removal proceedings. *Matter of Castrejon-Colino*, 26 I&N Dec. 667 (BIA 2015)**
 - Being fingerprinted and/or photographed is not enough
 - Does not have to occur at or near border



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What is the effect of a “break?”

- **Begin accruing new period of presence after break**
 - Different statutory language
 - Break is a temporary “interruptive event” (*Matter of Mendoza-Sandino*, 22 I&N Dec. 1236 (BIA 2000))

Stop-Time Rule

- INA § 240A(d)(1) -



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- **Terminates residence or physical presence when:**
 - A charging document specifying the date, time, and location of a hearing is served; or
 - when the alien commits an offense referred to in § 212(a)(2) that renders the alien inadmissible under section 212(a)(2) or removable under § 237(a)(2) or § 237(a)(4)



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Service of the NTA

- **When the alien is served a notice to appear under § 239(a)**
 - *Pereira v. Sessions*, 138 S. Ct. 2105 (2018)
 - “[a] putative notice to appear that fails to designate the specific time or place of the noncitizen’s removal proceedings is not a ‘notice to appear under [INA § 239(a)],’ and so does not trigger the stop-time rule.” *Pereira v. Sessions*, 138 S. Ct. 2105, 2113-14 (quoting INA § 240A(d)(1)); see INA § 239(a)(1)(G)
 - Third Circuit’s Approach
 - Service of a Notice of Hearing



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Service of the NTA

- **In the proceedings in which the alien applies for cancellation of removal**
 - Does NOT include:
 - a charging document served in any prior proceeding. *Matter of Cisneros*, 23 I&N Dec. 668 (BIA 2004); or
 - a charging document that was served but never filed in Immigration Court to commence removal proceedings. *Matter of Ordaz*, 26 I&N Dec. 637 (BIA 2015)



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Commission of an Offense

- **Offense must be one “referred to in § 212(a)(2)”**
 - *Matter of Campos-Torres*, 22 I&N Dec. 1289 (BIA 2000) (firearms offense)
 - *Matter of Garcia*, 25 I&N Dec. 332 (BIA 2010) (petty offense exception)
- **Commission of offense terminates accrual, regardless of whether offense is basis for charge of removal**
 - *Matter of Jurado*, 24 I&N Dec. 29 (BIA 2006)



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Retroactivity of Offenses

- **Circuit split on retroactivity to offense committed prior to IIRIRA**
 - Board has held pre-IIRIRA commission of offense triggers stop-time rule. *Matter of Robles*, 24 I&N Dec. 22 (BIA 2006); *Matter of Perez*, 22 I&N Dec. 689 (BIA 1999)
 - 1st Circuit agrees
 - 4th, 7th, 9th Circuits - stop-time rule not retroactive to pre-IIRIRA conviction if eligible when IIRIRA enacted

Annual Cap

- INA § 240A(d)(1) -
- 8 C.F.R. § 1240.21(c) -



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Annual Cap

- 4,000 grants of non-LPR cancellation of removal or suspension of deportation per fiscal year (except NACARA)
- After cap reached, cannot grant non-LPR cancellation in non-detained case; must reserve decision
- Deny cancellation in discretion if asylum or adjustment is granted

QUESTIONS?

